85-2090

No. 85-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE H. DICUPE,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

GEORGE H. DICUPE
Petitioner

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QUESTIONS PRESENTED FOR REVIEW

1. Is Due Process requisite in proceedings by military tribunals?

2. Whether Petitioner's Constitutional Rights to an impartial jury is denied when he is tried by a jury panel composed of officers (rather than peers) and where undue command influence is present.

3. Whether a Petitioner is denied the Constitutional Right to the Effective Assistance of Counsel when said counsel is selected and appointed by the convening authority and lower in rank than the prosecutor and judge and clearly intimidated by both during the trial.

4. Whether the denial of a Petition for New Trial on Newly Discovered Evidence, which would establish that a conspiracy existed to violate Petitioner's rights is a violation of the Due Process clause.

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IN THE

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OCTOBER TERM, 1985

No. 85-

GEORGE H. DICUPE

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, George H. Dicupe, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered on March 31, 1986.

OPINION BELOW

On March 31, 1986, the Court of Military Appeals entered its Memorandum decision affirming Petitioner's conviction of larceny. A copy of the memorandum is attached as Appendix A.

JURISDICTION

On March 31, 1986 the Court of Military Appeals entered judgment affirming the findings and sentence of the lower Court convicting Petitioner of larceny. [App.A]. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1259.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V "No person. . .shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. . ."

Amendment VI "In all criminal prosecutions, the accused right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously committed. . .and to have the Assistance of Counsel for his defense."

On May 23, 1986 this Court granted an extension of time to file a petition for writ of certiorari to, and including June 2, 1986.

STATEMENT OF THE CASE

Petitioner, an enlisted serviceman with 18 years of impecable service and awards, was charged with larceny of $1,000.00 from the Officer's Club where he worked during off duty hours.

Ten days after the money was found to be missing the investigators requested and he consented to the search of his home. Nine hundred (900.00) dollars were found within two minutes of the search. Although finger and palm prints were found on the bills, none of Petitioner's prints matched with those found.

A Court-martial was convened where Petitioner was tried by a Jury of non-peers; by one member who had been involved in the investigation of the case; and by a judge and prosecutor who outranked appointed Defense Counsel. Petitioner was found guilty and sentenced to confinement at hard labor for eleven

months, reduction in grade and bad conduct discharge.

After a substantial number of requests for leniency were submitted by members of the military community, the convening authority reduced the confinement to eight months and approved the rest of the sentence.

A timely Assignment of Errors and Brief on behalf of the accussed was filed with the Court of Military Review on September 7, 1982.

On September 9, 1982 a Petition for New Trial on Newly Discovered Evidence was filed with the same Court.

On November 4, 1982 the Court of Military Review issued a Decision and Order denying the petition for New Trial on the grounds that although the evidence could be used to support the "specter of a conspiracy to plant the money," it should have been discovered at the time of trial. The court affirmed the decision of the court-martial. A copy of the order is attached as Appendix B.

A petition to the Court of Military Appeals was timely filed. Said Court granted review on three of the issues raised. On November 9, 1983 oral argument was held before two of the judges (one judge was absent pending disposition of criminal charges against him). On March 31, 1986 the Court issued its decision affirming the lower Courts. [App. A].

REASONS FOR GRANTING THE WRIT

Due Process is a requisite in proceedings by military tribunals.

Although it has been established that proceedings before military tribunals are not required to conform

to exactly the same degree as proceedings in civil courts, due process remains a requisite. See *Gallaher v. Quinn* 363 F2d 301, 124 U. S. App. D.C. 172, certiorari denied 87 S.Ct. 167, 385 U.S. 881, 17 L.Ed. 2d 108. Still, the extent of the principle that due process is a requisite in a military tribunal remains in issue and is confusing.

In 1950, Congress established the Court of Military Appeals, under the Department of Defense, composed of three civilian judges. The purpose for the creation of this Court was to assure direct civilian review over military justice so that desinterested civilian judges could gain an understanding of the distinctive problems and legal traditions of the Armed Forces. *Noyd v. Bond,* 395 U.S. 683, 23 L.Ed. 2d 631, 89 S.CT. 1876. It appears that the Court has accomplished the purpose for which it was created, to wit., gain an understanding of the problems and legal traditions of the Armed Forces. However, such understanding of the Armed Forces is not equivalent to an understanding of constitutional rights.

The Court of Military Appeals has traditionally been a rubber stamp of the lower courts which in turn have been found lacking in their knowledge and/or application of constitutional principles.

As Justice Brennan pointed out in his dissent in *Schlesinger v. Councilman,* 420 U. S. 738 at 765:

> "It is virtually hornbook law that Courts-Martial as an institution are singularly inept in dealing with the nice subleties of constitutional law."

Constitutional rights, such as due process of law, the right to an impartial jury and to the assistance

of counsel have been, and still are, totally ignored in the military tribunals and as a consequence in the Court of Military Appeals.

A clear example of this is found in the instant case. The accused was tried by non-peers where command influence was present. Additionally, Defense counsel, who was selected and appointed by the prosecutorial body, was of lower rank and under the command influence of the prosecutor and the judge. Defense counsel was totally intimidated by both superiors. By reading the transcript it is evident that the peculiarity of the relationship between superiors and subordinates in the military was carried into the courtroom and that the accused's constitutional rights to the effective assistance of counsel as well to due process, were violated. The Court of Military Appeals however, did not see defense counsel's representation as a denial of the accused's rights to assistance of counsel but as a matter of strategy. The Court of Military Appeals opted for deciding the issue of ineffective assistance of counsel without the "need to consider whether Petitioner's constitutional right to counsel was violated." The Court evaded the constitutional issue even when it recognized that the "assertion of inadequate representation is commonly made, particularly where counsel is appointed and not personally retained." Appendix A at 442 [2,3].

In view of the fact that due process is a requisite in military tribunals and that the Court of Military Appeals is reluctant to decide issues of constitutional dimensions, this Court should determine the extent to which the 5th and 6th amendment rights apply in military tribunals at times of peace.

CONCLUSION

For the foregoing reasons, Petitioner George H. Dicupe respectfully requests that a Writ of Certiorari issue to review the judgment of the military courts.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES,

Appellee,

v.

GEORGE H. DICUPE, Technical Sergeant, U.S. Air Force,
Appellant.

No. 45516.
ACM 23515.

U.S. COURT OF MILITARY APPEALS.

March 31, 1986.

Accused, a technical sergeant United States Air Force, was convicted by general court-martial of larceny of $1,000. The Court of Military Review, 14 M.J. 915, affirmed findings and sentence. Petition to review was granted. The United States Court of Military Appeals, Cox, J., held that: (1) evidence was sufficient to prove accused's guilt beyond a reasonable doubt; (2) record indicated that defense counsel's representation of accused was adequate; and (3) there was no error prejudicial to substantial rights of accused in admitting testimony concerning unproven, speculative, nonconclusive, uncharged misconduct.

Affirmed.

OPINION OF THE COURT

COX, Judge:

Despite his pleas, a general court-martial convicted the accused of larceny of $1,000.00 from the Zaragoza Officers'

Open Mess (Officers' Club), in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The approved sentence extends to a bad-conduct discharge, confinement at hard labor for 8 months and reduction to the grade of E-3. The Court of Military Review affirmed the findings and sentence. 14 M.J. 915 (1982). We granted the accused's petition to review three issues, which we will discuss *seriatim.*

I. Whether As A Matter Of Law The Evidence Was Sufficient To Prove Appellant's Guilt Beyond A Reasonable Doubt.

Much of the evidence against the accused was circumstantial in nature. The club cashier had secured $1,000.00 in twenty-dollar bills in the safe in her office for the night. The bills were bound by a rubber band. The cashier was responsible for locking that safe when she left work each day. The accused, a night manager at the club, had access to the office and to another safe located therein, but did not know the combination of the cashier's safe. The following day, the same cashier found the safe secured but the packet of twenty-dollar bills was missing. A search of the safe failed to uncover the money. However, some 10 days later, during a consent search of the accused's on-base quarters, $900 in twenty-dollar bills was found in a plastic bag, in a service cap on the back of a shelf in the accused's bedroom closet.[1] When the money was found, the accused disclaimed knowledge of its presence in his quarters or how it came to be there.

At this point, the evidence before the court members presented three possible scenarios:

> (1) Someone other than the accused stole the money and later secreted it in accused's bedroom;

---

[1] When found, the bills were secured by a rubber band. Unfortunately, no further identification was made by either the cashier or the special agent who conducted the search. There was no direct evidence connecting the money found to that taken from the club safe.

(2) Someone other than the accused stole the money but the money that was found in his quarters was not related to the theft; or,

(3) The accused stole the money and attempted to secrete it in his bedroom.

Obviously, if the cashier's safe had been locked and the accused, in fact, did not know the combination, it would have been difficult to establish his complicity in the theft of the money. However, there was some confusion as to whether the cashier actually locked the safe as she was supposed to have done when she left work for the day, and there was evidence that the safe had been left unlocked in the past. It was the night manager's responsibility to check both safes when he closed for the night.

In addition—and most damaging to the accused's assertions of innocence—there was a statement made by the accused to a lady friend. She remembered the substance of the statement in this form:

> He goes, "Well, I don't know if you know of the trouble that I'm in, but I wouldn't have moved in base housing if I would've known"—he said, "I wouldn't of moved into base housing because then I wouldn't have been caught." He goes—he said, "The SP's can come in and search your house," and he said, "If you lived off base, they couldn't." That's not his exact words, but, you know, that was the gist of the conversation.

In our review, "we must examine the record of trial to determine" whether there was any "competent evidence . . . from which the" triers of fact "could find, beyond a reasonable doubt, the existence of" each and "every element of the offense charged." *See United States v. Cosby*, 14 M.J. 3, 4–5 (C.M.A. 1982), and cases cited therein. The members of the court-martial, the convening authority, and the Court of Military Review concluded that the evidence

established the accused's guilt beyond a reasonable doubt. These are the authorities empowered by statute to determine questions of fact. *United States v. McCrary,* 1 U.S.C.M.A. 1, 1 C.M.R. 1 (1951). While we may weigh and evaluate the evidence for the purpose of determining whether it was sufficient enough for the triers of fact to "find, beyond a reasonable doubt, the existence of every element of the offense charged," *United States v. Cosby, supra,* we do not apply the reasonable doubt standard on appeal. *United States v. McCrary, supra.* We conclude that there is sufficient competent evidence of record to support the findings of guilty in this case.

II. Whether Appellant Was Denied The Constitutional Right To Effective Assistance Of Counsel

On appeal, the accused questions the tacties of trial defense counsel in not objecting on several occasions. Review of a defense counsel's trial strategy is difficult, if not impossible, on appeal because the appellate court is not privy to the knowledge of the trial participants except to the extent such information appears in the record of trial. Before considering the constitutional aspects of the granted issue, we will determine whether appellant's statutory rights were violated by counsel's performance. We have held that an accused is guaranteed by Article 27(a), UCMJ, 10 U.S.C. § 827(a), "the *effective* assistance of counsel," *United States v. Rivas,* 3 M.J. 282, 287 (C.M.A. 1977), and that means "a reasonable competent counsel who exercises that competence in his . . . behalf throughout the trial." *United States v. Jefferson,* 13 M.J. 1, 5 (C.M.A. 1982). However, we have not attempted to define specifically those skills and knowledge demanded of a competent counsel. In *United States v. Jefferson, supra* at 6, we stated:

> [W]e have "assume[d] that the accused is entitled to the assistance of an attorney of reasonable competence" and have expressed the expectation that the

> attorney will " 'exercise . . . the customary skill and knowledge which normally prevails . . .' 'within the range of competence demanded of attorneys in criminal cases.' " We believe that . . . [this] requires that the attorney act as a diligent and conscientious advocate on behalf of this client.

Quoting *United States v. Rivas, supra* at 288.

In reviewing claims of inadequacy of representation we have used the standard set out in *United States v. DeCoster,* 624 F.2d 196, 208 (*en banc*) (D.C.Cir. 1979) (plurality opinion): "The claimed inadequacy must be a serious incompetency that falls measurably below the performance ordinarily expected of fallible lawyers." *See also United States v. Jefferson, supra.*

The Court below held:

> In our review of this record, we find no instances when the trial defense counsel remained silent when events at trial cried out for action. It is obvious that he was prepared and gave accused his best efforts. This case could have been defended differently and the accused did not receive the perfect trial he would have preferred. But, it was fair and he was accorded due process of law.

United States v. Dicupe, supra at 918.

It may well be that another defense counsel might have proceeded differently, both strategically and tactically. However, it also might well be that such an approach would not have succeeded as well as the one adopted here. The assertion of inadequate representation is commonly made, particularly where counsel is appointed and not personally retained. But appellate courts do "not lightly vacate a conviction" in the absence of a serious incompetency which "falls measurably below the performance . . . of fallible lawyers." *United States v. DeCoster, supra* at 214,

208. Here, defense counsel was well prepared, and he presented evidence and cogent arguments in favor of his client. That he did not object at the times envisioned by appellate defense counsel to be appropriate may indicate his tactical judgment instead of incompetence. In any event, we cannot see where his asserted inadequacy materially prejudiced the substantial rights of the accused. *United States v. Myles,* 7 M.J. 132 (C.M.A. 1979). The record indicates that "his representation of" the accused "was adequate" and "did not fall below the performance ordinarily expected of fallible lawyers." *See United States v. Jefferson, supra* at 7.

Our conclusion that there was no prejudice to appellant removes the need to consider whether his constitutional right to counsel was violated. *See Strickland v. Washington,* 466 U.S. 668, 697, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

III. Whether The Trial Judge Erred In Admitting Testimony Concerning An Unproven, Speculative, Non-Conclusive, Uncharged Misconduct.

This issue is related to the previous one and, as stated, creates a misleading conclusion.[2] The challenged testimony came from the direct examination of a Mrs. K., who was the relief cashier. Mrs. K. testified that once she had forgotten to lock the safe at the close of the day, and the following day she discovered that $40 was missing from a "bank" she had prepared previously. She further testified that the accused had been the night manager on the evening in question but that she did not mention the shortage to him.

Defense counsel did not object to Mrs. K.'s testimony and, indeed, during cross-examination, asked her whether

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[2] The issue as stated could lead only to one answer. However, as shown below, the evidence could be subject to several interpretations and varying inferences other than as being the uncharged misconduct of the accused. Apparently trial defense counsel recognized this.

she believed that the accused had taken the money. Defense counsel also elicited testimony to the effect that shortages in various funds occurred frequently. However, at the conclusion of her testimony, defense counsel asked for an instruction on uncharged misconduct. The military judge refused to give the instruction at that time but did give the instruct the members before findings. Trial counsel sought to justify the presentation of the testimony on the grounds that it "was simply to rebut testimony that there had been no previous incidents regarding the accused's conduct as a night manager." Defense counsel had elicited such testimony from the club managers during cross-examination. The instruction finally agreed upon stated:

> During the trial, evidence was admitted regarding a loss of forty dollars from the general cashier's safe on an occasion when the accused was night manager at sometime prior to the date on which the charged offense was alleged to have occurred. Such evidence was admitted solely for the limited purpose of rebutting testimony elicited by the defense regarding the prior good conduct and performance of the accused as a night manager at the Officers Open Mess. The extent, if any, to which this evidence has accomplished that purpose is a matter for your determination. I wish to emphasize, however, that this evidence may be considered for no other purpose than this limited purpose that I've outlined, no other purpose whatsoever. You may not infer from such evidence that the accused has an evil disposition or a criminal propensity and that he therefore committed the offense charged that is before you today.

Appellate defense counsel now contend, as they did below, that this evidence is inadmissible under Mil.R.Evid. 404(b), Manual for Courts Martial, United States, 1969 (Revised edition), which provides:

> *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident.

In response, the Court below held:

> The list of reasons contained in the rule for the admission of uncharged misconduct is not exhaustive. *United States v. Johnson,* 634 F.2d 735 (4th Cir. 1980).
>
> Evidence of uncharged misconduct may be introduced to rebut an issue raised by the defense. *United States v. Janis,* 1 M.J. 395 (C.M.A. 1976); *United States v. Johnson, supra; United States v. Fortes,* 619 F.2d 108 (1st Cir. 1980). Further, such evidence must be plain, clear and conclusive and connected with the charged offense in point of time, place and circumstances. *United States v. Janis, supra; United States v. Butcher,* 1 M.J. 554 (A.F.C.M.R. 1975); *United States v. Kelly,* 7 U.S.C.M.A. 584, 23 C.M.R. 48 (1957). Trial judges must determine whether evidence of uncharged misconduct is offered for a proper purpose, whether it is relevant and whether its probative value outweighs the danger of unfair prejudice to the accused. Mil, R.Evid. 403; S. Saltzburg, L. Schinasi, D. Schlueter, Military Rules of Evidence Manual 184 (1981). When viewed against that background we find the evidence was properly before the court and correctly limited in its application by the instructions given to the members by the military judge.

United States v. Dicupe, supra at 917.

This testimony was offered as rebuttal to the testimony that the accused performed his duties as night manager "[o]utstandingly well." Since one of his duties was to check

and secure the safes at closing, this incident related by Mrs. K. would indicate that on at least one occasion, he failed to act in accordance with his assigned tasks.

In addition, the nature of the testimony permits varying inferences to be drawn. One, of course, is that the accused took the $40. But, as recognized by trial defense counsel, it also could be inferred that the cashiers were careless in their performance of duties to secure the safes and in correctly counting the cash in their custody; and that persons other than the accused might have had access to the money within the safes. Further, it might arguably permit the inference to be drawn that the assistant cashier had miscounted the money allegedly taken by the accused. In view of the many conflicting inferences inherent in such testimony, reference to Mil.R.Evid. 403 is apposite. That Rule states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Clearly the military "judge is given enormous leeway under this Rule," and in close cases "evidence should be admitted rather than excluded." S. Saltzburg, L. Schinasi, D. Schlueter, *Military Rules of Evidence Manual* 176 (1981). Under the particular circumstances of this case, we cannot conclude that the military judge in any way abused his discretion[3] here, particularly where there was no objection and no motion to strike. Mil.R.Evid. 103(a)(1). In addition, the cautionary instruction set the testimony in

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[3] The issue is misleading in that there was no request for a ruling by the military judge. However, to the extent that the issue, as stated, presupposes an obligation to *sua sponte* intervene, we find no such obligation arose here.

the proper context for the court members.[4] Consequently, we find no error prejudicial to the substantial rights of the accused.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge EVERETT concurs.

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[4] It would have been better if trial counsel had limited the testimony to matters more directly related to the rebuttal of evidence of the accused's outstanding duty performance without reference to the consequences of his failure to do so.

APPENDIX B

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

UNITED STATES
v.

Technical Sergeant GEORGE H. DICUPE; FR 084-32-4143
UNITED STATES AIR FORCE

ACM 23515

Argued: 21 October 1982

Decided: 4 November 1982

Sentence adjudged 21 January 1982 by GCM convened at Zaragoza Air Base, Spain. Military Judge: James Z. Howey.

Approved sentence: Bad conduct discharge, confinement at hard labor for eight (8) months and reduction to airman first class.

Appellate Counsel for the Accused: Mayda Tsaknis, Washington, D.C., Colonel George R. Stevens and Major Richard A. Morgan. Appellate Counsel for the United States: Colonel James P. Porter, Colonel Kenneth R. Rengert and Major George D. Cato.

Before

HEMINGWAY, CANELLOS and RAICHLE
Appellate Military Judges

DECISION AND ORDER

HEMINGWAY, Senior Judge:

Contrary to his pleas, the accused was convicted of the larceny of $1,000.00 from the Zaragoza Officers' Open Mess, in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The approved sentence extends to a bad conduct discharge, confinement at hard labor for eight months and reduction to airman first class. The case is now before us on both a petition for new trial and assignment of errors.

The accused was being employed, during his off-duty time, as a night manager at the Zaragoza Officers' Open Mess. In his capacity as a night manager, the accused had access to the cashier's cage, which contained two safes. One safe was for the use of the night manager and the other was for the use of the cashier. The cashier's safe was normally locked during the night manager's shift and none of the night managers possessed the combination to the lock on that safe. The evidence indicates that one of the cashiers failed to properly secure the safe at the end of her shift and the accused removed $1,000.00 in twenty dollar bills. During a search of the accused's quarters ten days later, $900.00 in twenty dollar bills was found secreted in a service cap in a plastic bag. The cap was found on the back of a shelf in the accused's bedroom closet. The accused denied knowledge of the presence of the money and asserted unsuccessfully that it had been planted there by persons unknown.

The accused, submitting affidavits from his daughter and a friend of hers, petitions for a new trial on the basis of newly discovered evidence. The affidavits state that on the day the accused's quarters were

searched, but prior to the arrival of the search team, both girls entered the accused's house and heard noises coming from the master bedroom. Since no family members were supposed to be home, the girls became scared and ran out of the house. The accused claims that his evidence, if presented to another court-martial, would produce a different result. We disagree.

A petition for new trial may be granted when:

a. The record of trial, petition, and other matters presented by the accused indicate an injustice may have resulted.

b. The evidence in fact is newly discovered.

c. Due diligence to discover it was exercised at the time of trial.

d. The newly discovered evidence will probably cause a different result when presented to another court-martial. *United States v. Chadd,* 13 U.S.C.M.A. 438, 32 C.M.R. 438 (1963).

We view the information contained in the affidavits as matters which would have been discovered by due diligence at the time of trial. The assertion that the accused, believing evidence to have been planted in his house, did not discuss possible unusual occurrences around the house with family members is incredible. As noted in the government's brief, the affidavits "can be used to support the specter of a conspiracy to plant the money" but they "do not add substance to the specter. It remains ghostlike and of insufficient substance to create a reasonable doubt as to appellant's guilt." We are not persuaded that this evidence would cause a different result if presented to another court-martial. We find the claim of fraud on the court contained in the petition devoid of merit. The petition for a new trial is denied.

The accused assigns as error the admission into evidence of *uncharged misconduct.* During cross-examination of an assistant manager of the Officers' Open Mess, defense counsel inquired into the accused's performance of duty in the following manner:

Questions by defense counsel:

Q. As the assistant manager, were you supervisor of the night manager?

A. Yes, sir.

Q. Particularly about Sergeant Dicupe, in terms of following procedures and responsibility, etcetera, how did he perform his duty as night manager?

A. Outstandingly well.

Q. What abuot following procedures?

A. The total way to my knowledge. Everything that I expected or asked of him, there was absolutely no problem.

Q. Do you know of any occasion where paperwork wasn't handled properly or filled out properly?

A. No.

To rebut this evidence, trial counsel elicited testimony from a cashier that she had inadvertently left her safe open at the end of her shift several months before the offense charged here. The accused was the only other person who had access to the safe until the cashier returned for her next shift. During her next shift the following day, she found $40.00 missing from the safe and assumed the accused was responsible. The accused never called to her attention the insecurity of the safe as she would have expected. Defense counsel did not object to this line of questioning but conducted a thorough cross-examination on this issue apparently attempting to demonstrate the care-

lessness of the cashier and the possible access of others to the safe. Prior to findings, the military judge instructed the members:

> During the trial, evidence was admitted regarding a loss of forty dollars from the general cashier's safe on an occasion when the accused was night manager at sometime prior to the date on which the charged offense was alleged to have occurred. Such evidence was admitted solely for the limited purpose of rebutting testimony elicited by the defense regarding the prior good conduct and performance of the accused as a night manager at the Officers' Open Mess. The extent, if any, to which this evidence has accomplished that purpose is a matter for your determination. I wish to emphasize, however, that this evidence may be considered for no other purpose than this limited purpose that I've outlined, no other purpose whatsoever. You may not infer from such evidence that the accused has an evil disposition or a criminal propensity and that he therefore committed the offense charged that is before you today.

The accused now contends this rebuttal evidence is inadmissible under Mil. R. Evid. 404(b). We hold otherwise. Mil. R. Evid. 404(b) provides.

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The list of reasons contained in the rule for the admission of uncharged misconduct is not exhaustive. *United*

States v. Johnson, 634 F.2d 735 (4th Cir. 1980). Evidence of uncharged misconduct may be introduced to rebut an issue raised by the defense. *United States v. Janis,* 1 M.J. 395 (C.M.A. 1976); *United States v. Johnson, supra; United States v. Fortes,* 619 F.2d 108 (1st Cir. 1980). Further, such evidence must be plain, clear and conclusive and connected with the charged offense in point of time, place and circumstances. *United States v. Janis, supra; United States v. Butcher,* 1 M.J. 554 (A.F.C.M.R. 1975); *United States v. Kelly,* 7 U.S.C.M.A. 584, 23 C.M.R. 48 (1957). Trial judges must determine whether evidence of uncharged misconduct is offered for a proper purpose, whether it is relevant and whether its probative value outweighs the danger of unfair prejudice to the accused. Mil. R. Evid. 403; S. Saltzburg, L. Schinasi, D. Schuleter, Military Rules of Evidence Manual 184 (1981). When viewed against that background we find the evidence was properly before the court and correctly limited in its application by the instructions given to the members by the military judge.

Citing the absence of objections to some of the evidence and prosecution tactics of which he now complains, the accused contends he received *ineffective assistance of counsel.*

The right to be represented by counsel means effective counsel, *United States v. Jefferson,* 13 M.J. 1 (C.M.A. 1982), but the accused has the burden of proving he was not represented by effective counsel. *United States v. Zuis,* 49 C.M.R. 159 (A.C.M.R. 1974). Appellate courts will not second guess the strategic or tactical decisions made by trial defense counsel. *United States v. Rivas,* 3 M.J. 282 (C.M.A. 1977). Mere mistakes and errors in judgment of counsel are insufficient to establish a violation of an accused's constitutional or statutory right to the effective assistance of counsel. *United States v. Rivas, supra.*

In our review of this record, we find no instances when the trial defense counsel remained silent when events at trial cried out for action. It is obvious that he was prepared and gave the accused his best efforts. This case could have been defended differently and the accused did not receive the perfect trial he would have preferred. But, it was fair and he was accorded due process of law.

We have considered the other assigned errors and have resolved them adversely to the accused. Accordingly, the findings of guilty and sentence are

AFFIRMED.

CANELLOS and RAICHLE, Judges, concur.

OFFICIAL:

/s/RICHARD F. WHITNEY
RICHARD F. WHITNEY
Major, USAF
Chief Commissioner